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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte WILLIAM NOONAN

Appeal 2008-0867
Application 10/624,322
Technology Center 2100

Decided: September 18, 2008

Before JAMES D. THOMAS, ALLEN R. MACDONALD, and
ST. JOHN COURTENAY III, *Administrative Patent Judges*.

COURTENAY, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1-20. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

THE INVENTION

The disclosed invention relates generally to retailing devices and apparatuses. More particularly, the present invention relates to the use of radio frequency identification (RFID) enabled shelf tags and a wireless portable personal shopper which are used to manage a database that describes the location of all items in a store. (Spec. 1).

Independent claim 1 is illustrative:

1. A method for updating a retail planogram comprising the steps of reading an electronic transmission from at least one RFID tag in a retail environment located in proximity to a product, using a personal shopper device having a location sensing mechanism, a memory, a software means, and an RFID reader, wherein an initial planogram is stored therein,

collecting said read electronic location information transmitted from said at least one RFID tag by said shopper device,

analyzing and comparing said collected location information by said software means of said shopper device, with said initial planogram in relation to initial location information of said product with collected location information for said product from said collected information,

updating said initial location information for said product in said initial planogram in response to collected location information to provide an updated planogram to display current location information for said product in a current planogram arrangement in said retail environment.

THE REFERENCES

The Examiner relies upon the following references as evidence in support of the rejections:

Hind	US 2002/0174025 A1	Nov. 21, 2002 (filed May 17, 2001)
Hoffman	US 2002/0178013 A1	Nov. 28, 2002 (filed May 22, 2001)
Neumark	US 6,550,674 B1	Apr. 22, 2003 (filed Aug. 23, 2002)

THE REJECTIONS

1. Claims 1, 3-5, 7-12, 14-16, and 18-20 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Neumark.
2. Claims 2, 6, and 13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Neumark in view of Hind.
3. Claim 17 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Neumark, in view of Hoffman.

CONTENTIONS BY APPELLANT

1. Appellant contends that the Examiner erred in rejecting claims 1, 3-5, 7-12, 14-16, and 18-20 as being anticipated by Neumark because Neumark fails to teach the feature of an initial planogram that is stored in the personal shopper device, as recited in claim 1. (App. Br. 11).

2. Appellant contends that the Examiner erred in rejecting claims 2, 6, and 13 under 35 U.S.C. § 103(a) as being unpatentable over Neumark

and Hind because Hind fails to cure the deficiencies of Neumark discussed *infra* regarding claims 1 and 10.

3. Appellant contends that the Examiner erred in rejecting claim 17 under 35 U.S.C. § 103(a) as being unpatentable over Neumark and Hoffman because Hoffman fails to cure the deficiencies of Neumark discussed *infra* regarding claim 10.

ISSUES

1. Whether Appellant has shown that the Examiner failed to establish that Neumark teaches the feature of an initial planogram that is stored in the personal shopper device, as recited in claim 1?

2. Whether Appellant has shown that the Examiner has failed to establish that the combination of Neumark and Hind discloses or suggests all of the limitations recited in claims 2, 6, and 13?

3. Whether Appellant has shown that the Examiner has failed to establish that the combination of Neumark and Hoffman discloses or suggests all of the limitations recited in claim 17?

PRINCIPLES OF LAW

Anticipation

In rejecting claims under 35 U.S.C. § 102, "[a] single prior art reference that discloses, either expressly or inherently, each limitation of a claim invalidates that claim by anticipation." *Perricone v. Medicis Pharm Corp.,* 432 F.3d 1368, 1375-76 (Fed. Cir. 2005) (citation omitted). "Anticipation of a patent claim requires a finding that the claim at issue

'reads on' a prior art reference." *Atlas Powder Co. v. IRECO, Inc.*, 190 F.3d 1342, 1346 (Fed Cir. 1999) ("In other words, if granting patent protection on the disputed claim would allow the patentee to exclude the public from practicing the prior art, then that claim is anticipated, regardless of whether it also covers subject matter not in the prior art.") (internal citations omitted).

Appellant has the burden on appeal to the Board to demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006). Therefore, we look to Appellant's Brief to show error in the proffered prima facie case.

Findings of Fact

The following findings of fact are supported by a preponderance of the evidence.

Specification

1. Appellant defines the claimed "planogram" as how retailers configure a layout of their respective store. (Spec. 3, ll. 11-12).

Neumark

2. Neumark is directed to a system for inventory control. Neumark's system includes a mobile device (R&C) for reading labels and communication. (Abst).
3. Neumark teaches that a data file is created corresponding to the label reading which is transmitted to a receiver and a data processor. (Col. 4 ll. 52-56).
4. Neumark teaches that the data file record stored in the R&C device includes information such as the item description, serial/stocking

number, item count, and a time stamp of the reading. (Col. 6 ll. 16-21, 35-38).

5. Neumark teaches using triangulation for locating the mobile R&C device at a given time. (Col. 4 ll. 60-65).
6. The time stamp of the label reading and the R&C triangulation is used to determine the location of a given item. (Col. 4, l. 65 – col. 5, l. 3).
7. Neumark teaches that the location information of an item is processed and stored by the second data processor 70. (Col. 7, ll. 49-54 and Fig. 1).

Anticipation

Claims 1, 3-5, 7-12, 14-16, and 18-20

We consider the Examiner's rejection of claims 1, 3-5, 7-12, 14-16, and 18-20 as being anticipated by Neumark.

Appellant contends that Neumark fails to teach the feature of an initial planogram that is stored in the personal shopper device, as recited in claim 1. (App. Br. 11). We agree for the reasons discussed *infra*.

Neumark's R&C mobile device is a reader that creates a file that contains information such as the item description, item serial or stocking number, item count quantity, and item date. This information is obtained from the item's label. (FF 3-4). The Examiner contends that this label information forms a "layout" of the store (i.e., a planogram) that is "essentially stored in the device as soon as it reads the labels." (Ans. 12). We disagree.

Claim construction

At the outset, we conclude that Appellant's disclosed and argued definition of the claim term "planogram" is consistent with the plain, ordinary, and customary meaning of the term, i.e., a planogram pertains to how retailers configure a layout of their respective store (*see* FF 1; *see also* App. Br. 14).

Consistent with Appellant's defined plain meaning for the term "planogram," we agree with Appellant's contention that Neumark is void of any discussion regarding a planogram (i.e., store layout) that is stored within the R&C mobile device. As noted by Appellant, the R&C device data storage capabilities are limited to creating a data file with associated time stamps. (App. Br. 13; *see also* FF 4-6). In particular, we do not agree with the Examiner's determination that the item information (i.e., item description, serial/stocking number, item count, and time stamp of the reading) is a "planogram" as defined and claimed by Appellant. (S*ee* FF 1, FF 4). We find that Neumark's item information that is stored in the R&C mobile device does not equate to a store's layout or plangram, as defined by Appellant.

Moreover, even assuming *arguendo* that Neumark's triangulated location information describes a store layout, we note that the R&C mobile device location information is received by a plurality of external transceiver communication nodes 60 (col. 7, ll. 26-27), and such information is further processed (i.e., triangulated using information from three communication nodes) and stored *external* to the R&C device (FF 5-7).

Therefore, based on the record before us, we conclude that Appellant has shown error in the Examiner's finding that Neumark teaches an initial

planogram stored in the personal shopper device, as recited in claim 1. We note that "absence from the reference of any claimed element negates anticipation." *Kloster Speedsteel AB v. Crucible, Inc.,* 793 F.2d 1565, 1571 (Fed. Cir. 1986).

Because we conclude that Appellant has met the burden of showing error in the Examiner's prima facie case of anticipation by a preponderance of the evidence, we reverse the Examiner's rejection of independent claim 1 as being anticipated by Neumark.

We further note that the limitation of an initial planogram that is stored in the personal shopper device is similarly recited in independent claims 10 and 19. Therefore, we also reverse the Examiner's rejection of claims 10 and 19 as being anticipated by Neumark. We likewise reverse the Examiner's rejection of dependent claims 3-5, 7-9, 11, 12, 14-16, 18, and 20 as being anticipated by Neumark.

Obviousness Rejections

Claims 2, 6, and 13

The Examiner rejected claims 2, 6, and 13 under 35 U.S.C. § 103(a) as obvious over Neumark and Hind. Appellant contends that Neumark is deficient for the reasons set forth regarding claim 1, and Hind failed to cure these deficiencies. (Br. 20-21).

We conclude that the Examiner has not demonstrated on this record that Hind cures the deficiencies of Neumark, noted *supra* regarding independent claims 1 and 10.

Therefore, we also cannot sustain the rejection of claims 2, 6, and 13 under 35 U.S.C. § 103(a) on appeal.

Claim 17

The Examiner rejected claim 17 as being unpatentable over Neumark and Hoffman. Appellant contends that Neumark is deficient for the reasons set forth regarding claim 10, and Hoffman fails to cure these deficiencies. (Br. 28).

We conclude that the Examiner has not demonstrated on this record that Hoffman cures the deficiencies of Neumark, noted *supra*.

Therefore, we also cannot sustain the rejection of claim 17 under 35 U.S.C. § 103(a) on appeal.

CONCLUSIONS OF LAW

Based on the findings of facts and analysis above, we conclude that Appellant has shown the Examiner erred in rejecting claims 1, 3-5, 7-12, 14-16, and 18-20 under 35 U.S.C. § 102(e) for anticipation. Likewise, we conclude that Appellant has shown the Examiner erred in rejecting claims 2, 6, 13, and 17 under 35 U.S.C. § 103(a) for obviousness.

DECISION

The decision of the Examiner rejecting claims 1-20 is reversed.

REVERSED

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